IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE ÆTNA INSURANCE COMPANY

vs.

WILLIAM C. BOONE, ET AL.

No. 263, OCTOBER TERM, 1876.

IN ERROR.

ARGUMENT OF FRANCIS FELLOWES,

COUNSEL FOR THE DEFENDANTS IN ERROR.

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ARGUMENT.

This is a writ of error, brought to revise a judgment of the Circuit Court of the United States for the District of Connecticut. The action was *assumpsit*, upon a policy of insurance, by which the defendants insured the plaintiffs against damage by fire, to an amount not exceeding six thousand dollars, on goods in their store, in Glasgow, Missouri.

The essential clauses of the policy, so far as it relates to the questions which the plaintiffs in error seek to raise upon this record, are as follows:

"The insurers do agree to make good unto the assured all such immediate loss or damage, not exceeding six thousand dollars, as shall happen by fire to the property insured.

PROVIDED always, and it is hereby declared, that this company shall not be liable to make good any loss or damage by fire which may happen, or take place, by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft, at or after a fire."

To this action the defendants pleaded the general issue, *non assumpsit*, with a notice subjoined, [Record, pp. 14, 15], to the effect, that the fire happened or took place by means of causes excepted by the Proviso.

This notice was filed under a statute law of the State of Connecticut, which provides that,—

"Under the general issue, the defendant may give his title in evidence or any special matter of defence and justification, according to the nature of the action, but the defendant shall not so give in evidence any matter of avoidance, or any defence consistent with the truth of the material allegations in the declaration, unless, at the time of pleading, he shall file notice thereof in writing."

This notice will be found on pages 14 and 15 of the Record. The effect of it was to put the matters, alleged in it, in issue, not in the form of a special plea, but as part of the general issue.

To this general issue, tendered by the defendants, and concluding to the country, the plaintiffs added the *similiter*, and the parties thus put themselves upon the jury. But, subsequently, by virtue of the Act of Congress of March 3d, 1865, they waived a trial by jury, and the issue was tried to the court. The trial was had at the September Term, 1873. At the April Term, 1874, the court found the issue for the plaintiffs and rendered judgment for them.

The Record of the trial, finding, and judgment, p. 15, is in the following words:—

"And thereupon the process aforesaid was continued between the parties, upon the plea aforesaid, in this same court, before the judges thereof, and the issue above joined came on to be tried at the term of this court held at Hartford, within and for said district, on the third Tuesday in September, 1873, on the 24th day of said September, and said parties, by their attornies, having filed a stipulation in writing, with the clerk of this court, waiving a trial by jury, thereupon said court proceeded to try and determine the issues of fact in said case, and said parties were fully heard, with their evidence and arguments of counsel, and said cause was continued to the term of this court, held at New Haven, on the fourth Tuesday, being the 28th day of April, A. D. 1874, when, upon due consideration, this court found the issue for the plaintiffs, and thereupon it was considered that the said plaintiffs recover of the defendants the sum of Nine Thousand One Hundred and Seventy-seven Dollars and fifty cents, damages, and their costs, taxed and allowed to be Seventy-three Dollars and twenty-six cents, amounting in the whole to the sum of Nine Thousand, Two Hundred and Fifty Dollars and twenty-six cents, and that execution issue therefor."

The court, at the time of thus finding the issue, and rendering judgment, filed with the clerk, a written opinion, containing at length, the reasons upon which the judgment was founded, which is appended to the Record, at page 15.

No exceptions were taken to any rulings or opinions of the court, at the trial, or during the progress of the cause, or at the term at which the judgment was rendered, and no other or further proceedings were had before the final adjournment of the court for the April term. The Record does not show, nor was there in fact, any continuance of the cause, upon the files or docket of the court, from that term.

At the September term following, the court undertook to make a special finding of facts, p. 24, and to allow a bill of exceptions, p. 26. Upon this Special Finding and Bill of Exceptions, the plaintiffs in error now seek to bring the cause before this court for review.

Assuming, for the present, that this Special Finding and this Bill of Exceptions form a part of the Record, and are legally before you. I shall proceed to discuss the merits of the questions thus presented.

The Act of March 3d, 1865, it will be observed, provides :—

That the finding of the facts may be either general or special, and shall have the same effect as the verdict of a jury, and that the rulings of the court, when excepted to at the time, in the progress of the trial, may be reviewed by the Supreme Court of the United States, and that this court may also review the finding of facts, when special, to determine whether they are sufficient to support the judgment.

Independently of this act, and at common law, for obvious reasons, no error can be assigned, or heard, upon exceptions not taken at the trial. Further, it is not enough that the exceptions were so taken and that a Bill of Exceptions has been allowed. The Record must show affirmatively that they were so taken. This precise point has been often decided, here and elsewhere. * As this record does not show that any exceptions were taken at the trial, even, if this Bill of Exceptions be regarded as part of it, we may exclude from consideration everything stated in it as error, and turn our attention exclusively to the special finding of facts to ascertain whether these facts are sufficient to sustain the judgment; † and this can work no detriment to the plaintiffs in error, since the questions which they seek to raise, upon the Bill of Exceptions, are identical with those arising upon the special finding of facts.

Upon proving the execution of the policy, the destruction, by fire, of the goods insured by it, their value, and the furnishing of the preliminary proofs, the plaintiffs' case ended, and the defendants' case began.

The defendants' case was that the loss was excepted by the Proviso, set forth in their plea.

Here, they, as in duty bound, assumed the burden of proof. The matters stated in their notice, as part of their plea, were new matters, which it was not incumbent on the plaintiffs to negate in their declaration. They could be put into the issue only by the defendants, and hence the affirmative rested upon them. In Lounsbury vs. Protection Insurance Company, 8 Conn. Rep. 458, it was held that exceptions, like those in the present case, were not conditions precedent, but matters of defence to be taken advantage of by pleading, and therefore it was not necessary to negate, in the declaration, the existence of such excepted predicaments. The same point was decided in 2 Duer, 481, and in Clark vs. Hamilton Insurance Company, 9 Gray, 148.

And so the defendants undertook to show, that the loss took place by means of invasion, insurrection, or of a military or usurped power, and was therefore excepted from the risk assumed by them.

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* Sheppard vs. Wilson, 6 How., 275; Turner vs. Yeates, 16 How. 14; Phillips' Practice, 122-3-7; Walton vs. United States, 9 Wheat. 657; Muller et al. vs. Ehlers.

† Jennisons vs. Leonard, 21 Wall., 302.

Here they took the ground :—

First; That the officer commanding the military forces of the United States, at Glasgow, was a military power, or that, in setting the fire, which destroyed the goods, he exercised the military power of the United States government, and so, they argued, that the loss happened or took place by means of a military power, within the meaning of the Proviso.

In the *second place*, they contended, in substance, that the rebels were a military and usurped power, and that, although they did not destroy the goods, themselves, they caused a military necessity for their destruction by the officer of the United States government, who was a military officer, and hence, they argued, that the loss took place by means of invasion, insurrection, or to speak more definitely and particularly, by means of a military or usurped power, within the meaning of the Proviso.

There is some confusion of ideas, apparent upon the face of the plea, rendering it uncertain whether the United States officer, in command, or the rebels were the military power intended. But, in the argument, they take both grounds.

Now, the rebellion, or, to use the concrete, instead of the abstract term, the rebels, were doubtless a military or usurped power, In this case, the pleader, in effect, calls them such. The words of the plea are:—

"The rebel forces or troops then and there carrying on the rebellion, insurrection, or invasion, and endeavoring to sustain a military and usurped power."

If, indeed, the loss happened or took place by means of a military or usurped power, it is excepted by the very words of the Proviso, no matter whether any military necessity existed for it or not. The allegation, in the plea, that the United States officer, in command, ordered the destruction, as a military necessity, is entirely immaterial. The destruction was as complete without the military necessity as with it. Military necessity was, in no sense, the *cause* of the loss. The act, by means of which the loss took place, being the lawful act of the United States officer, or, which is the same thing, the act of the United States government, is not converted into the act of rebels, nor attributable to the rebellion as its *proximate* cause, by means of the alleged military necessity. The military necessity was the *motive* which prompted the act, but was not itself the *cause*. Therefore, if the rebels set the fire, or it can be attributed to them as the *proximate* cause, it took place by means of a military or usurped power, independently of the fact of military necessity. There is,

however, no pretence that the rebels set the fire, or caused the loss, except through the military necessity which, it is said, induced the United States officer to set the fire.

As to the other ground, taken in the argument, that the act of the United States officer, in setting the fire, was the act of a military power, within the meaning of the Proviso, or that his act, being a lawful exercise of the power entrusted to him by the government, was the act of the government, as a military power, if this ground be tenable, it is so, independently of the fact of military necessity, and just as tenable without such necessity, as with it. All that is required, in order to except the loss, is that it should happen or take place by means of a military or usurped power, and military necessity does not convert the United States officer, or the United States Government, into a military power.

In whichever of these two aspects you view the case, if the ground taken be tenable, the loss is excepted, independently of military necessity. But there is no middle ground, no *tertium quid*, compounded of rebellion, acts of the United States Government, and military necessity, which brings the loss, if it did not happen purely and simply, by means of a military or usurped power, within the exceptions named in the Proviso. Military necessity has nothing to do with military power, nor has it any thing to do with causation. It is not named in the contract as a cause of exception. The parties to the contract did not either, in express terms or by implication, make any exception of loss happening by means of military necessity.

The material points, therefore, are to ascertain the meaning of the terms, used in the Proviso, to designate the excepted causes of loss, and to determine, from the facts and the law, whether these causes can be adjudged to be the causes of the loss.

There is no pretence that the loss happened by means of riot or civil commotion. These words may, therefore, be excluded from consideration.

The words invasion and insurrection are well understood, and cannot be the subject of controversy. The only terms, therefore, in the category of exceptions, which require elucidation, are military or usurped power, and particularly, the terms military power.

The question is, do the words military power mean the lawful military power of the country where the loss takes place, or do they mean an unlawful military power, in other words, a *mere* military power, not derived from the constitution and the laws, but usurped. In brief, is the word *or*

here disjunctive or conjunctive? Is the power either military *or* usurped, *or* both military *and* usurped?

It must be observed that the word *power*, of itself, implies that lawful authority is not intended, but simply *power*, sustained by force of arms, and to render the sense clear beyond doubt, the words, or "usurped power," are added. This use of the word *or* is not uncommon. Mr. Webster, in his dictionary, says, "*or* is often used to express an alternative of terms, definitions, or explanations, of the same thing in different words. Thus we say, a thing is a square, *or* a figure under four equal sides, and angles." So, in this Policy, the draftsman says, in effect, a military power, *or*, which is the same thing, a usurped power.

In this sense, the word *or* occurs in several instances, in this Policy. Thus, the Policy says "loss *or* damage, happen *or* take place," goods *or* merchandise."

As the painter, by light and shade, brings out the significance of his work, so, in ascertaining the real significance of terms in language, it is often useful to observe what word is the antithesis to the word employed. And here, it is clear that the word *military* has its antithesis in the word *civil*, and the words *military power*, their antithesis in the words *civil power*.

Now it is obvious that a military power must be also a usurped power, since these words, *ex vi termini*, import a power not based upon the constitution and the laws, but upon mere force of arms, and usurped power necessarily means a military power, since it involves the overthrow of the civil power aud rests upon mere military force.

We may here also properly resort to historical interpretation. As matter of history, the terms, military or usurped power, were first introduced into Policies of Insurance, in Great Britain, soon after the Jacobite Rebellion of 1715.* James the Third, as he was called by his adherents, invaded the realm, raised an army, declared himself sovereign, and was proceeding to sustain his claims by force of arms. In the eyes of George the First, and of the established government. he was a usurper. But he had power. For he had raised an army, and conducted military operations on such a scale as to excite great alarm and even consternation. But his power was a *military power*, a *mere* military power, or, which is the same thing, a *usnrped* power.

* Ellis on Insurance, 41; Park on Insurance, 657; Marshal on Insurance, 791.

This invasion was, indeed repelled. But Sweden threatened invasion, and James was so powerful, both at foreign courts, and in the hearts of Britons, that a recurrence of similar events was greatly feared.

And in 1720, the London Assurance Company introduced into their Policies the following words :—

"No loss or damage by fire, happening by any invasion, foreign enemy, or any military or usurped power, will be made good by this company ;" as much as to say :—

If the French forces come to establish James upon the throne, if Sweden invades the country, or, if the Pretender himself comes with a military force and usurps the power of government, if upon the occurrence of these or like events, the invader, foreign enemy, or usurper, sets fire to the subject of our risks, we will not be responsible.

In 1726, the Sun Office, another British Insurance Company, inserted the same words in their Policies, and in 1727, added the words civil commotion.

It is obvious that these exceptions had no reference to the acts of George the First, or to those of any lawful military authority of the realm. Great Britain, from time immemorial, had military power, but no insurance company had ever thought of protecting itself against the acts of such power. That power had committed no ravages, destroyed no property. It was subordinated to the laws and regulated by them. But a military or usurped power, like that of the Pretender, knew no restraint, was subject to no laws, and if it burned property, no compensation could be obtained.

These words soon became the subject of judicial construction. In 1767, in Drinkwater vs. The London Assurance Company, 2 Wilson, 363, the question was, whether a fire, set by a mob, fell within the exception of a military or usurped power. The court held that these words meant an invasion by foreign enemies to give laws and usurp the government, or an internal armed force in rebellion, assuming the power of government, an invasion from abroad, or an internal rebellion, when armies are employed to support it, when the laws are dormant and silent and firing of towns is unavoidable. A mob was not such a power.

I add, neither is a lawful military force of the lawful government of the country.

In Langdale vs. Mason, reported in 2 Marshall on Insurance, 791, decided in 1780, the question, as to the proper construction of these words,

came before that great expounder, not to say framer, of the law of insurance, Lord Mansfield.

Mr. Langdale was insured in the Sun Office. The Policy contained the same exceptions as the Policies of the London Assurance Company, with the words, civil commotion, added. The property insured was destroyed in a great riot against the Papists, and the question was, whether this riot was a military or usurped power, or a civil commotion, either of them. It was held that it was not a military or usurped power, but was a civil commotion, and so the loss was excepted, from the Policy, by the latter words.

Lord Mansfield said, The words, "military or usurped power," were ambiguous, but they had been the subject of judicial determination, referring, doubtless, to the case of Drinkwater,—that they must mean rebellion, conducted by authority, determined rebellion, with generals who could give orders, as in the year 1745, when the rebels came to Derby, if they had ordered any part of the town, or any single house burned, that would have been by authority of a rebellion, which his Lordship held to be the same as a military or usurped power. And, he added, usurped power takes in rebellion acting under usurped authority.

The words, "military or usurped power," in the judgment of Lord Mansfield, meant determined rebellion, conducted by authority. Such was not a mere assemblage of rioters.

I add, much less is the lawful military power of the government of the United States.

Let me draw forth from history an example of military or usurped power.

The rebels who came to Derby, in 1745, were commanded by the young Pretender, Charles Edward. This adventurous son of the Stuarts and of the Sobieskis, burning with the blood of the one race. and thirsting for the rights of the other, leaving his sojourn in France, with a small band of followers, entered the Highlands of Scotland, rallied the clans, marched on Edinburgh, captured the city, followed up his success with the victorious battle of Preston, and having established his authority in Scotland, proclaimed his father King.

Then crossing the borders, in quest, as he said, of a coffin or a crown, he invaded England, took Carlisle, in Cumberland, the ancient bulwark of the English against Scottish invasion, and thence, advancing into the heart of the country, marching on foot, to the music of the *pibroch*, in his

Highland garb, at the head of his clans, and levying contributions on the people as he went,—by the celerity of his movements, the impetuosity of his action, and the intrepidity of his conduct, he filled the whole realm with consternation.

Reaching Derby, within four days' march of the capital, he threatened, thence, the overthrow of the existing government. The army of George, engaged in foreign war, recalled in haste, had just returned. The navy was absent. Secret enemies, friends of the Stuarts, abounded. The nation was panic-stricken. The Majesty of England trembled on his throne. The *lawful* military power seemed incapable of resisting the progress of the invader. The *civil* power was impotent. Everything was yielding to *military* power. In the eyes of the existing government, it was also *usurped* power.

This, may it please your Honors, is that military or usurped power which, in the days of the first Pretender, alarmed the British underwriters, and caused them, in 1720, to insert in their Policies, exceptions of losses happening by means of any military or usurped power. This, too, is that military or usurped power to which Lord Mansfield refers, where he says, in effect, when the rebels came to Derby, if they had ordered any part of the town, or any single house, burned, that would have been by means of a military or usurped power.

The adjudged cases, in this country, to wit, City Fire Insurance Company of New York vs. Corlies, 21 Wend. 367, decided in 1839; Sprull vs. The North Carolina Mutual Life Insurance Company, 1 Jones, N. C., Law Rep. 126, decided in 1853, and Harris vs. York Insurance Company, 50 Penn. Rep. 341, decided in 1865, all adopt the doctrine of the English cases, and put the same construction on the words, "military or usurped power."

In the case in the 21 Wend., the Policy, like the Policy in the present case, excepted losses happening by means "of a military or usurped power." The property was destroyed by order of the Mayor of the City of New York, to arrest the progress of the great conflagration of 1835. The Mayor was authorized to make such order, with the concurrence of two aldermen. As the order was made without such concurrence, the insurers contended that it was an act of usurpation, and that the loss was excepted by the words, military or usurped power, contained in the Proviso. The court held that the order of the Mayor, even if unauthorized by law, was not usurpation, in the sense of the words used in the Policy, giving the same construction to the words, "military or usurped power," as that given by the English Courts, to wit: that they meant rebellion

conducted by authority, and making no distinction between the word military and the word usurped.

In the North Carolina case, the slave, *Ned*, had escaped from his master, and was killed by an armed patrol, organized under the laws of the state, for the purpose of restoring fugitive slaves to their owners, and which, in the discharge of their duty, was endeavoring to arrest him for that purpose. The master held a policy of insurance on his life, which excepted losses happening by means of military or usurped power. The insurers contended that the loss was excepted by these words. The court held that the loss was not within the exception, saying, "there was no usurped civil power, and no military power except that recognized by the Constitution."

The learned Court below, in their opinion, observe, "if an armed patrol may be deemed a military power, this case is especially pointed and significant." Your Honors will observe that the very point of the argument, on the part of the insurers, was that this patrol was a military power, and the decision of the Court turned upon the point that it was a military power "recognized by the Constitution." It was not therefore a military or usurped power, within the meaning of the Proviso.

In the Pennsylvania case, Gen. Couch, commanding a military force of the United States, burned a bridge, to prevent the advance of a rebel force, and as a consequence of firing the bridge, the plaintiffs buildings were burned. The policy excepted losses occasioned by mobs or riots. The insurers contended that "this was a peace policy, and did not cover a loss happening in the manner in which this did." The Court held, that the firing of the bridge, which was the proximate cause of the loss, was "an act of sovereignty, on the part of our own duly constituted military and civil authorities," observing, that the loss was occasioned *approximately* by *lawful orders*, of the military authorities, and *remotely* by *an invading army*." The Policy. in this case, did not contain, so far as appears from the Report, the usual exception of losses arising by means of a military or usurped power. I cite it, because it is significant to show that the act of the United States officer, in destroying the goods, which the defendants below set up in their plea, was an act of sovereignty, on the part of our own duly constituted military and civil authorities, and was not the act of a military or usurped power.

We may, therefore, in the words of the learned Court, in the 21 Wend.. conclude: "Whatever donbt there may have been originally about the meaning ef these words, their legal import had been long settled when

this Policy was executed, and we cannot assume that the parties used them in any other than their legal sense,"

The underwriters, I maintain, when they inserted them in this Policy, must be presumed, in law, to have intended just what the former adjudications of the Courts held them to mean, and the insured must be presumed, in law, to have accepted them in the same sense.

It is also material to observe, that every other cause of exception, named in the Proviso, is necessarily, and in itself, unlawful, not tolerated by the laws of the country. Invasion, insurrection, riot, civil commotion, all, have for their object, to a greater or less extent, the overthrow of the laws, thus producing a state of things far more perilous to insurers than the ordinary state, in which the laws prevail, and dangers of losses by fire are not likely to arise from lawless violence. This, obviously, is the class of losses which the insurers intended to except, not losses arising from acts of the lawful military power of the country, which power is designed to repel invasion, repress insurrection, prevent and subdue riot and civil commotion, and so, to maintain the laws in their supremacy, and prevent those perils from lawless violence which the insurers, obviously, had in view. It is not to be supposed that the lawful military authorities of the government will wantonly set fire to goods or buildings, and in this way, increase the perils of risks, so that prudence requires insurers to except losses arising from the acts of such a power from their Policies. And as to the lawful acts of such authorities, in destroying private property for public use, the government is responsible, as we shall hereafter see, to make good the loss. There is, therefore, no reason why insurers should except losses, caused by such acts, from their Policies.

I conclude, therefore, that the maxim, *noscitur a sociis*, furnishes the true rule of interpretation in this case, and that military power means unlawful military power, usurped power, or, in the words of Lord Mansfield, rebellion conducted by authority.

This maxim has often been adopted, in the construction of Policies of Insurance. I cite: Breasted *vs.* The Farmers Loan and Trust Co., 4 Selden, 304; Harper's Admrs *vs.* Phœnix Ins. Co., 19 Mo, 506, and Cluff *vs.* Mutual Benefit Life Ins. Co., 13 Allen, 308. In these cases, the question was, whether in a policy of life insurance, the words, "shall die in known violation of any law of the land," embraced violations of the civil law, or were limited to violations of the criminal law. The Courts held, that from the character of the other causes of exception, with which they stood associated, they must be restricted to violations of the criminal law.

adopting the principle laid down by Lord Bacon,* *Copulatio verborum indicat acceptionem in eodem sensu.* The coupling of words together shows that they are to be understood in the same sense. And when the meaning of any particular word is doubtful or obscure, it may frequently be ascertained, by looking at the words in the same category, with which it stands associated. For, *Quæ non valeant singula, juncta juvant.*

The word *military*, in this policy, stands associated in a much more intimate relationship with the word *usurped* than with the other terms used to denote the other exceptions. Military *or* usurped is the expression. To construe *military*, here, as meaning the lawful military authority of the United States, would be to place it in strange company, the company of a usurper. By means of any military power, or of any usurped power, by means of any lawful act of the military authorities of the United States, in the exercise of the prerogatives of sovereignty, or by means of the lawless acts of rebels, seeking to destroy that sovereignty, how unnatural is such a construction!

This rule of interpretation seems peculiarly proper in construing contracts of insurance. Indeed, the learned Court, in the case above cited from the 19 Mo., expressly say: "In the interpretation of contracts of insurance, the maxim, *noscitur a sociis*, obtains."

In this case, it devolves upon the defendants to show that the words "military power" embrace, within their meaning, the act of the commander of the United States forces, named in their plea, in causing the fire. They must show, in order to exempt themselves from responsibility, that acts of the United States government, executed by a military officer, or by a military force, or by order of some military authority, are the acts of a military *power*. But for the moment, for the sake of the argument, I take this burden from their shoulders, and I assume the responsibilty of showing that these words do not embrace within their meaning any such acts. The words are, "any military or usurped power." No one will pretend to characterize the United States government, since the termination of the war for independence, as a usurped power. We may therefore dismiss these words from the inquiry, and seek for the meaning of the words, "military power," And here, for the sake of the argument, I forego, for the moment, the aid in their construction, derived from their association with other words, and especially derived from their close connection with the word *usurped*, and I let them stand alone, so that the Proviso may read:

* Bacon's Works, vol, 3, p. 26,

"It is expressly understood and declared that this Company shall not be held liable to make good any loss by fire that may happen or take place by means of any military power.

And I ask if the government of the United States can, with any propriety, be called a military power. To entitle it to this appellation, it must first be divested of all the great principles of constitutional liberty, derived from *Magna Charta* and the common law, upon which its foundations rest; it must be resolved into a pure military despotism, like that of the ancient tyrants, or like that of tyrants of modern times, such as the infamous *Garcias* of Paraguay. It will not be pretended that the words signify any act of the government of the United States as a military power in this sense. But it is claimed that if the fire be caused by any act of a military officer, or any military force of the United States, or by order of any military authority of the United States, that this is a fire caused by a military power. I answer, this construction does violence to our elementary notions of the meaning of words. To call a military officer a military power, or a military force a military power, or the orders of a military authority a military power, would be an unnatural and strange use of words. We may say, indeed, that the United States is a great military power, meaning to indicate her immense resources for carrying on war, as we sometimes say, Great Britain is a great naval power, referring to her great means for naval warfare. This is equivalent to saying that the United States *has* great military power. But to say a nation *has* military power, and a nation *is* a military power, except in the sense that it *has* such power, are very different things. And when we speak of the cause of a fire, requiring but a single spark to kindle it, it would seem to be entirely out of place to speak of military *power*, except for the purpose of denoting the *character* of the cause. So in this case, if the cause be a lawful, constitutional, sovereignty, it matters not how much military power that sovereignty possesses, it can not be characterized as a military power.

But resume again that which, for the moment, I forebore to press in the argument, I mean the word "*usurped*," and we are constrained to admit that the word power, as qualified by this epithet, has precisely the same meaning that it has when qualified by the word *military*. What then is usurped power? I answer, as did Lord Mansfield, it is organized rebellion. What is any military power? I answer again, in the words of the same illustrious judge, it is organized rebellion,* not a lawful mu-

*Except in the case of invaders or foreign enemies, who can not properly be called rebels or usurpers. But in the country invaded, they are a *military* power proper, since they depend on mere force of arms. Subjects or citizens of the country in organized rebellion, against the government, or usurping the government, are, for the same reason, a military power, not a constitutional sovereignty.

nicipal government, not a *potentia civium*, acting in their collective capacity as a state or nation, but a *potentia militum*, power of soldiers, a *military* power, acting under a mere military organization and subject to no law but the will of their military superior. In either case, the adjective is used to denote the nature, the character of the power, not its resources.

Now it can not be demonstrated that the United States government, or any authority, force, or officer thereof, is a military power. And if we admit, what is incontrovertibly proved in this case, that the United States officer, when he ordered the burning, was only asserting the paramount rights of the United States, in the property destroyed, how can it be maintained, for a moment, that this was by means of a military power? No military code authorized the act, no military power or force was employed to execute it, a single spark, from a single hand, sufficed. The public law authorized the act, a proper obedience to that law required it, the voice of the nation commanded it, it was an act of ownership, on the part of the nation, and not a destruction by a military power. The act does not differ, in character or cause, from any act of the government in taking private property for public use. It might, with equal propriety, be said to be by an act of military power, when the government appropriates private property for roads, forts, arsenals, court houses, postoffices, or for any other public use, as to say that this act was the act of a military power. The circumstance, that the agent of the government, who appropriates the property to the public use, is a military officer, is entirely immaterial, and can make no difference. No one would pretend that it would make any difference in the other cases named. But somehow the idea of war-risks has got into the heads of these underwriters, and they summon these words, "military power," which have slumbered in policies of fire insurance ever since the times of the Pretender, without ever being invoked for such a purpose, except in the case of the slave *Ned*, to deliver them from their obligations. If the act of the officer is not justifiable as the act of the nation, it is either the act of an incendiary, or it is accidental. In either case, the insurers are responsible.

I will only add a few words more as to the construction of the words, "any military or usurped power." In Bell's Commentaries on the Laws of Scotland, Vol. I., page 672, it is said :—"In general, there is in the policy an exception of fire occasioned by invasion, foreign enemy, or any military or usurped power *whatsoever*, and in some there is a farther exception of riot, tumults, and civil commotion." This word *whatsoever*, which has now dropped out, but without making any difference as to the

original idea, contains a strong implication that the framers of the exceptions considered invasion as a military power, foreign enemy as a military power, and then, lest these terms might not be comprehensive enough to embrace domestic rebels and usurpers, like the Pretenders and their followers, that they added, *any* military or usurped power *whatsoever*. The construction is clear that the causes of exception are all of a kindred character.

I argue, therefore, that the words, military power, and usurped power, are identical in meaning, not only from their own natural inherent import, and from the import of the other terms in the same category with which they stand associated, but also from the history of their first introduction into policies, and from the subsequent judicial determination of their meaning by the courts.

Having ascertained the meaning of the terms, used in the Proviso, to designate the excepted causes of loss, the next point is to determine the meaning of the words, "happen or take place by means of."

This brings us to the well-known principle of the law of insurance, that in cases of loss, it is the *proximate* cause only which is regarded. *In jure, causa proxima non remota spectatur*, and that by proximate cause is meant the cause, next preceding the effect, that is capable of producing it. This is the *causa causans* of the school men, the *efficient cause* of the metaphysicians, the *causa proxima* of Lord Bacon; in plain common sense English, *the* cause. This is that by means of which the loss happens or takes place. When once this is ascertained, we cannot go further and inquire what was the cause of this cause. In General Mutual Life Insurance Company vs. Sherwood, 14 Howard, 352, Mr. Justice Curtis, in delivering the opinion of the Court, says:—"In looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril." "One of the most valuable of the criteria, furnished by the authorities, says Mr. Justice Miller, in the opinion of the Supreme Court, in Ins. Co. vs. Tweed, 7 Wallace, 44, "is whether any new cause has intervened between the fact accomplished and the alleged cause."*

In Wilts vs. Conn. Mutual Life Ins. Co., 48 N. Y. Rep., decided in 1871, where a policy of life insurance excepted death arising from "any of the casualties or consequences of war or rebellion, or from belligerent forces

* In this case, loss by fire, caused by explosion, was excepted. The question was not, what was the proximate cause of the loss, which, it was admitted, was fire, but whether the explosion was the proximate cause of the *fire*.

in any place where the insured may be, and the insured was killed by robbers, or marauders, taking advantage of the peculiar condition of the country, arising from the war, the Commission of Appeals held that he did not die from the excepted causes, observing that the "war may be a remote cause of the death, as it was the cause of disorder and lawlessness, but the *proximate* cause is murder and highway robbery."

The words, in this Policy, and in the same category of exceptions, "happen or take place by means of a theft, at or after a fire," indicate the character of the causation intended. To happen, or take place, by means of a theft, at or after a fire, means that the direct act of thieves, stealing the property, causes the loss. It is not a loss caused by something else which happens or takes place, because thieves are present, or threaten to be present. Indeed, properly speaking, the *proximate* cause is the only cause. The remote cause, so called, is a mere *antecedent*, but possesses no *causality*. "The proximate cause," says a learned writer,* "contains the whole *causal* power, and does not derive it from the remote." Thus, a grandfather is the remote cause of his grandson, since, if there had been no grandfather, there could have been no grandson, but no power of the grandfather is instrumental in begetting the grandson. The whole *causal* power is in the father. The grandfather is the cause of the father, but not of the grandson. He is, indeed, a necessary *antecedent* of the grandson, but not the *cause*.

When the Duchess of York, in Richard III., says to her grandchildren:—

> "Incapable and shallow innocents,
> You cannot guess who caused your father's death,"

she means the person who produced that result by his own act, the murderer himself, and not the father of the murderer, although his father was a necessary *antecedent*, a remote cause of the result, so to speak, but for the existence of which, the result never would have happened. Nor does she refer to the *motives* or *incentives* which prompted the murderer to do the deed.

The same drama furnishes other instances of the use of the word *cause*; in some of which, it signifies *motive*; in others, *causation*.

Thus, Gloster, addressing the Lady Anne, says:—

> "Is not the *causer* of the timeless deaths
> Of these Plantagenets, Henry and Edward,
> As baneful as the executioner?"

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* Am. Law Review, Vol. 4, No. 2.

Gloster himself is the expositor of the sense in this instance, when he says:—

> ————for I did kill King Henry:
> But it was thy beauty that *provoked* me.

Lady Anne, in her reply, uses the word in the proper sense of *causation*.

> "Thou wast the *cause*, and most accursed effect."

Gloster, again, responding, uses the word as at first.

> "Your beauty was the cause of that effect,
> Your beauty, which did haunt me, in my sleep,
> To undertake the death of all the world,
> So I might live one hour in your sweet bosom."

This is the language of *passion*, not of *law*, nor of *philosophy*. Cause here signifies *motive, incentive*, not *causation*.

With these observations, as to the true meaning of the terms used in the proviso, in mind, we are prepared to come to the facts which the defendants below set up as bringing the loss within the exceptions.

The main facts, as stated in the Special Finding, purporting to have been made by the court, Record, p. 24, are, that the town of Glasgow, Mo., where the plaintiffs' goods were burned, was at the time of the fire a military post of the United States, containing military stores of the United States, deposited in the City Hall, so called. On the same street with this building and nearly in a direct line with it, at about 150 feet distant, stood the plaintiffs' store. Three buildings intervened, but not in contiguity with each other. On the 15th of October, 1864, when the fire occurred, Colonel Chester Harding, an officer of the United States government and commanding a lawful military force of that government, had possession of the town, and had the lawful custody and control of these stores. On the morning of that day, a superior rebel force attacked the town, and the battle continued for several hours, with such advantage on the part of the rebels, that Colonel Harding, apprehending that the town would be taken,—to prevent the stores from falling into the hands of the enemy, ordered Major Moore, one of his officers, to destroy them. In obedience to this order, the City Hall was set on fire and consumed, with its contents. The fire spread from building to building, along the line of the street, until it reached the store of the plaintiffs and destroyed it, with its contents, including the goods insured by the Policy in this action. During the attack, some shells were thrown into the town by the enemy, but no shell caused any fire.

Major Moore had no other means of executing the order of Colonel Harding, and in the exigency, that order was a lawful and discreet use of the authority vested in the commanding officer.

The question is, whether, upon these facts, this loss by fire happened or took place by means of any of the causes excepted in the Proviso, or by means of a cause not so excepted.

In the first place, it is certain that the fire did not happen or take place by means of any act done by the rebels. It was not the work of invaders, rioters, persons in civil commotion, or insurrection, and I maintain, that it was not the work of any military or usurped power, in the sense in which these words are used in this Policy.

In the next place, it is certain that the fire was the consequence of the act of Col. Harding, exercising on the part of the United States, the right of *eminent domain*, according to the doctrine of the cases of Grant vs. The United States, Court of Claims Rep., Vol. 1, page 41, and of Wiggin's case, Court of Claims Rep., Vol. 3, page 412, which doctrine is in conformity to the opinion of the Supreme Court of the United States, in Mitchell vs. Harmony, 13 Howard, 113.

This act was a lawful act, not an act of lawless violence. In the words of the court, in the case cited from the 50 Penn. Rep., referring to a like act, "It was an act of sovereignty on the part of our own duly constituted, military and *civil* authorities. It was the legitimate use, on the part of the United States government, of their paramount right in the property destroyed; in legal terms, the exercise of the right of *eminent domain*, a right derived from the *jus gentium*, law of Nature, recognized by Vattel, Grotius, and all the great writers on that law, as pertaining to all civilized nations, and also expressly sanctioned by the Fifth Article of the Amendments to the Constitution of the United States, which, assuming that the right exists, forbids the exercise of it, without making just compensation. How can it be pretended that the parties to this contract, by excepting losses arising from the exercise of military or usurped power, intended to except losses arising from the exercise of such a right?

It may be said that if the town had not been attacked by the rebels, the fire would not have occurred, and therefore, it did occur by means of one or more of the causes excepted in the Proviso. It would be a sufficient answer to say that the antecedent is not the cause. But waiving this, I reply, that it may be indeed, that Col. Harding would not have set fire to

the City Hall, if the rebels had not attacked the town. But even this is not certain. He might have done so, without this antecedent. The argument is based merely on supposition. He might have done so, under the apprehension that they would attack it, although as yet at a great distance from it. He may have been desirous of relinquishing the post for one more advantageous, and unable to remove his stores, set them on fire, to prevent their falling into the hands of the enemy, and so have burned the plaintiffs' goods, His garrison may have been prostrated by pestilence, and he forced to depart and leave his stores behind, or burn them. An unfounded rumor of the approach of the enemy might have prompted the act. The case admits of many suppositions. But the question recurs, Is the loss to be attributed to the remote cause of invasion and its unlawful associates in the Proviso, or to its actual *proximate* cause, the act of the United States government, in the exercise of the right of *eminent domain*, an act which in no way increased the perils of the risk?

If, therefore, we are to attribute the loss to its proximate cause, it must be attributed to the act of Col. Harding, in setting fire to the City Hall. His act was sufficient to produce the effect, and did produce it. The reasoning of the case in the 7th of Wallace, before cited, is in point. There was no intervening cause. The same fire which burned the City Hall burned the plaintiffs' property. It is impossible to resolve the destruction into parts, to say, that Col. Harding burned the City Hall, but did not burn Eberle's saddlery, or Steinmet's shoe store, or Chamberlin's jewelry store, for thus I may designate, in conformity with the fact, the three intervening buildings, specified in the special finding,—or the plaintiffs' building and goods. The conflagration, so far as regards its cause, was one and indivisible. The buildings, in close contiguity to each other, were necessarily in simultaneous conflagration, The City Hall, we may well suppose, fell with a crash, and communicated the fire to the nearest building in the line, and this rendered the destruction of the other buildings certain. Col. Harding knew the exact situation, and must be presumed to have intended the natural consequences of his acts. In Catlin vs. Springfield Fire Ins. Co., 1 Sumner's Rep., 446, it was held "that legal design is to be imputed to a party, where the consequence naturally flows from the act." Col. Harding's purpose to destroy must be taken to extend to whatever was actually destroyed by his act, without any intervening cause, although he had no specific purpose in his mind, except to destroy his stores. In legal contemplation, he intended to destroy whatever it was necessary to destroy, whatever would naturally be destroyed, and,

indeed, whatever, under the circumstances of this case, was, in fact, destroyed, in the accomplishment of his purpose to destroy his military stores.

Col. Harding, in fact, had no specific design to destroy the City Hall, apart from his design to destroy his stores. The only order which he gave was to destroy his stores. He gave no order to burn, but, in effect, ordered the burning; because it was necessary to burn in order to destroy the stores, and whatever happened, in that town, from fire, was the result of his order to Major Moore.

It is to be observed that the military stores were the property of the government. There was no exercise of the right of *eminent domain*, in destroying them. For their destruction no compensation was required, and the only specific order which Col. Harding gave was to destroy the stores, but in effect, he ordered the burning, because Major Moore could not execute the order without burning. It will not, therefore, be seriously denied, that for the burning of the City Hall, the government would be bound to make compensation to the owners, and if so bound, who will pretend that their fellow sufferers, in the same conflagration, are to be excluded from the benefit of that just and salutary provision of the fundamental law, which requires compensation to be made to all persons who have been forced to relinguish their property to the government for public use? The city of Glasgow, owners of the City Hall, prefer their claim to the government, and it is recognized, while Eberle, Steinmet, Chamberlin, and these plaintiffs, are sent away,—sufferers indeed, unfortunate, but without right or remedy! It cannot be so. The simple statement of the case is enough. No civilized nation will tolerate such injustice. The property of the plaintiffs is taken for public use just as truly as the property of the owners of the first building set on fire, and their right to compensation is equally clear.

This much premised, I come to the point of the case, that the cause of the loss was not either of the causes excepted in the policy. I have not been discussing the doctrine of *eminent domain* in the abstract, nor that of the obligation of the government to make compensation, apart from its application to the matter in hand. The point is this: If the destruction of the plaintiffs' property was caused by the government, in the exercise of their lawful right to take or destroy private property for public use, and for which the plaintiffs are entitled to just compensation, then it follows, as a necessary consequence, that this loss, by fire, did not happen or take place by means of any of the unlawful causes

named in the Proviso. The idea that the cause of the fire was invasion, insurrection, riot, civil commotion, or any military or usurped power, is excluded. For, in the absence of a positive statute requiring it, no government is bound to make compensation for losses arising from these causes. Such losses must be borne as a common misfortune, *damnum absque injuria*, to which all citizens are liable, and to which they must submit without redress. If the enemy, in war, burns my house, the government is not required, by any principle of public law, to make compensation, and so of losses from the acts of rioters and the rest.

I maintain, therefore, that this loss was caused by the lawful act of the government, in destroying the property for public use, not by the act of a *military* power, but by an act of constitutional sovereignty, an act of *civil* power, although performed by a military officer. This granted, no logic can show that it is within any of the exceptions in the policy. The constitution does not provide for compensation for losses caused by lawless acts, or by the acts of a hostile power. If, therefore, the government is liable for this loss, it was not caused by a lawless act, nor by the act of a hostile power, and if the words *military* and *usurped* are equivalent, as I have shown, it follows as a necessary consequence, that the cause of the loss, in this case, was not any one of those named in the exceptions.

But, whether the government be liable, or not liable, to make compensation for this loss, whether it be the taking of private property for public use or not, it by no means follows, if it be not, that this loss by fire happened or took place by means of invasion, insurrection, or of any of the causes named in the policy as exceptions. The *proximate* cause of the loss is none the less the act of the officer of the United States government in command, and such act is not named in the contract as one of the exceptions.

If it be said that the act of Col. Harding, or of Major Moore, was not the *direct* cause of the loss, that the loss was an *accidental* consequence of that act, so that the government is exempt from the duty of making compensation, and that there was no taking of private property for public use, in the sense of the constitution, because whatever befell the plaintiffs' property was *accidental*, I answer, the cause of the fire remains unchanged. The fire is not converted into a fire arising or taking place by means of a military or usurped power, or by any of its kindred causes. Whether accidental, or not accidental, it is always a fire happening or taking place by means of a lawful act of the officer of the United States, in command, and if caused by *accident*, it is precisely one of those accidents which the

plaintiffs are insured against in the contract. Nor is it material whether the act be justifiable or not justifiable. Even if wanton, lawless, wilful, or malicious, it is not the act of invaders, rioters, persons in insurrection, or civil commotion, nor of any military or usurped power, and therefore the loss is not excepted from the risk.

The insured, indeed, took all the risk of a loss by fire caused by any of the excepted causes, and the insurers all other risks, no matter how the fire be caused, whether by incendiaries, by negligence, by wantonness, by legal and justifiable means, by the government, as the necessary or the accidental consequence of their acts, by accident, or by design, other than the design of the insured, the defendants are bound, by the express words of their contract, to make good the loss.

If they have failed to use words to express their intent, or if there be any doubt as to the construction of the words used, the fault is their own, and they are responsible. They made their own exceptions, and according to the well-known rule of the law of insurance, the language used is to be construed more strongly in favor of the insured and against the insurers.

In conclusion, I submit that there is no ambiguity in the language of this Proviso. The obvious, natural import of the words employed designates plainly the unlawful character of the causes excepted. The history of their first introduction into Policies of Fire Insurance shows the nature of the risks intended to be excluded, and the subsequent adjudications of the courts render it certain that the words, "military or usurped power," have no reference to the acts of the lawful military authorities of the country, but do refer to such a military or usurped power as was exercised by the Pretender, in his daring efforts to overthrow the government and gain the crown.

The doctrine of *proximate* cause, upon the facts in this case, excludes all the excepted causes, and leaves no room for doubt.

The whole case is narrowed down to this:—

The act of the United States officer in command, was the proximate cause of the loss. This act was not the act of persons in invasion, insurrection, riot, or civil commotion, nor of any military or usurped power. Therefore the loss was not excepted from the risk.

The learned judges of the Circuit Court have thought proper to file their opinion upon the points arising upon the so-called Special Finding of

Facts, and to send it up here as a part of the proceedings. I think it, therefore, not improper to ask Your Honors to give it careful consideration, especially as it contains a clear and explicit statement of the rulings, which you are asked to review, and of the reasons upon which those rulings were founded. This Opinion begins on page 15 of the Record. I have appended it to this Argument.

This cause is one of novel impression, no other of the kind having ever arisen in this, or in any other country. Cases involving analogous principles have arisen. To some of them I have referred. But this is the first time in the history of jurisprudence that it has been contended, that an act of lawful sovereignty, in taking private property for public use, was an act of military or usurped power. Notwithstanding its novel character, I would most willingly rest upon the principles advanced, and await the judgment of the court upon the points discussed. I am most anxious to obtain the opinion of this court upon these points, not only for the satisfaction of the immediate plaintiffs in error, but of others, interested in the controversy, whose names do not appear upon the record. But a sense of professional duty forbids me to omit any thing that appertains to my clients' rights. Hence, I must ask the attention of the Court to the state of the Record, as it was at the close of the term when the judgment was rendered.

When the April Term, 1874, closed, the Record showed a general finding of the issue for the plaintiffs, equivalent, by the very words of the act under which the trial was had, to a general verdict of a jury. No exceptions to the rulings of the Court, taken at the trial and during the progress of the cause, appear. Neither is there any special finding of facts, unless the opinion of the court, filed in the cause, can be so regarded, contrary to the express determination of this court in Dickinson vs. the Planters' Bank, 16 Wall. 250. Besides, if this opinion has the effect of a special verdict, why add to it another special verdict, as the court afterwards attempted to do. There was, therefore, nothing of record which could be assigned as error.

Why, then, are we here, to-day, before this court, attempting to review the judgment of the Circuit Court?

The answer is, because of certain proceedings of the plaintiffs in error, and certain orders of the judges of the Circuit Court, in vacation, and of the Circuit Court itself, at the next term.

These proceedings and orders were :—

1. An application of the defendants below to the Circuit Judge for an order on the plaintiffs to show cause before him, at Chambers, why the defendants should not have leave to make a case, termed a Bill of Exceptions, including the evidence, special findings of fact, and conclusions of law, with stay of execution.

2. The granting of such leave by order of the judge of the District Court, to whom the hearing was transferred, acting as Circuit Judge, with a direction that a Bill of Exceptions and Special Finding of Facts, to be made in conformity to the opinion of the court, on file, should be prepared, and submitted to the plaintiffs for examination, and should be approved by the court at its next term, and that the execution should be further stayed.

3. On the first day of the next term, of the Court, a Bill of Exceptions, exceptions not made at the trial, or during the progress of the cause, as required by the act of Congress, allowed and signed by the judges.

4. A Special Finding of Facts, equivalent to a special verdict of a jury, inserted in the Record, in addition to the general verdict, already there, and remaining there undisturbed, which special verdict includes not merely the facts referred to in the Opinion, but the additional fact, that one of the shells thrown by the rebels into the town, struck the store of the plaintiffs, but without causing any fire.

5. An order of the Court directing the Special Finding to be made a part of the Record, and together with the Bill of Exceptions, to be filed, *nunc pro tunc*, as of the preceding term, with a further stay of execution, to enable the defendants to apply to a Judge of the Supreme Court for an Order granting leave to give the security required by law upon issuing a writ of error.

These are, in substance, the Proceedings, by virtue of which, it is contended, that this court shall now review the cause, and reverse the judgment.

It will be observed that these Proceedings are not, and do not purport to be, amendments of the Record, nor corrections of any errors or defects in the Record, but simply the allowance of a Bill of Exceptions then, for the first time, taken, and presented, and the insertion in the Record of *new matter, a special verdict*, in addition to the general verdict, already there.

The Question is, Whether the judges, in vacation, or the Court. at its next term, had any jurisdiction to make these orders,—or to state the question more simply, whether the Court, at its next term, had any jurisdic-

tion to make an order, adopting the order of the judge, made in vacation, as its order, since the order made in vacation, unless adopted by the court, at its next term, no longer had any efficacy. It did not confer jurisdiction on the court to make the order which it did make, nor was it a necessary preliminary to the exercise of such jurisdiction. If the court had such jurisdiction, it had it independently of any order of the judges made in vacation. The sole question, therefore, is as to the jurisdiction of the court to make the order.

If such jurisdiction exist, it must be derived from the Constitution of the United States, or from Acts of Congress. In the Superior Courts of Common Law, of general jurisdiction, it is sometimes said, that the jurisdiction may be presumed, from the necessity of the case, to prevent a failure of justice, although it cannot be distinctly traced to its origin, and, sometimes, it has been asserted, that jurisdiction may be presumed, upon the principle, *omnia rite acta presumuntur*. But, even in these courts, it may well be doubted whether this principle can ever be resorted to, to establish a *jurisdictional fact*. Once let the jurisdiction be shown, and then, in the absence of proof to the contrary, this principle governs. However this may be, in the Federal Courts, there is no presumption of jurisdiction. The Constitution of the United States, and Acts of Congress, under the Constitution, are the sole sources of jurisdiction. The Federal Courts may, indeed, adopt principles of the common law, statutes of the states, and even rules of the common law practice, or of the English courts, or the rules of practice of the State Courts, or make original rules for themselves, provided, they do so, by virtue of Acts of Congress, under the Constitution, conferring the power upon them, expressly, or by legal implication. But, in these courts, there is no presumption of jurisdiction. The sources of their power do not lie in the bosom of antiquity, covered with the dust of ages, but are open to the eye of every one who can read the constitution, and the laws enacted under its authority. It is incumbent, therefore, on those who assert the jurisdiction, to show that it exists, and whence it is derived. It is not for the defendants in error to show a *negative*.

I maintain that no provision of the constitution, no act of Congress, no rule of court, or of practice, either in the Federal courts, or of the state courts, in Connecticut, can be found, whence the jurisdiction to make the orders in question can be derived, either expressly, or by legal inference. If there be any such provision, act, or rule, let it be pointed out, that this court may see clearly the source of the jurisdiction, asserted by the Hon-

orable judges of the Circuit Court for the District of Connecticut.

In Connecticut, the judges of the state courts, by virtue of special statutes, can, in vacation, make orders of notice of the pendency of suits to non-resident defendants, grant temporary injunctions, appoint temporary receivers, issue commissions to take testimony, but no judge can stay execution, even of the judgments of his own court, except in term, and in open court, and while the suit is pending. Whoever desires a stay of execution, in vacation, or in term, after judgment and discontinuance of the cause, must institute an independent suit, expressly for that purpose. And no court and no judge has any jurisdiction over a cause, after final judgment and discontinuance, either, in vacation, or at a subsequent term, to insert in the Record, as of the term when judgment was rendered, *nunc pro tunc*, a special verdict, rendered in vacation, or at such subsequent term.

It seems superfluous, if not disrespectful, to discuss a question so elementary, before this court. My only apology, and my warrant, for so doing, are to be found in the action of the learned and eminent judges below. I will merely advert to a few elementary principles and to a few of the many authorities.

The word, *term*, implies, in itself, a limitation of jurisdiction, in point of time.

"Throughout all Christendom, in very early times," says Blackstone, "the whole year was one continual term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *dies fasti et nefasti*, went into a contrary extreme, and administered justice upon all days alike, till at length, the church interfered, and exempted certain holy seasons, from being profaned by the tumult of forensic litigation."

As a consequence of this, in the course of time, and in the days of Edward, the Confessor, the present regular terms of the English courts were established. Ever since then, the jurisdiction of the courts, over causes, has been limited, in point of time. Upon the establishment of *terms*, the word, *continuance*, became a necessary *legal* word, implying, in itself, that the jurisdiction over a cause could be extended from one term to another only by an act of continuance. Otherwise, there would be no limit to the power of the court over a cause, even after judgment and discontinuance, no matter how many terms, or how many years, may have elapsed.

In Petersdorffs' Abridgment, Title, Amendment, p. 504, it is said:—

"The court may amend, at common law, in all cases whilst the proceedings are in *fieri*, that is, until judgment is signed, and during the

term in which it is signed. For the roll, or record, is only the remembrance of the court during the term, but after the term, the court cannot amend any fault in the roll, unless it be occasioned by the misprision of the clerk, for then the record is not in the breast of the court, but in the roll."

And again, "when the roll or record varies from the original, the roll may be amended, at common law, at any time, for this is a misprision of the clerk, and the original furnishes something to amend by."

In Blackstone's Commentaries, Vol. 3, p. 316, it is said, "If a continuance of the cause is omitted, the cause is discontinued."

The process or proceedings in a suit, say the old writers and reporters, should regularly be *continued* from the commencement of the suit until final judgment. If there be any want of continuance, which is not aided, the parties are out of court.

The learned judges below seem to have overlooked these elementary principles. The final judgment was entered at the preceding term, and the cause was discontinued, that is, no continuance appears of Record. Yet the judges held jurisdiction over it.

In Jacques vs. Bridgport Railroad Co., 43 C. R. 32, the Supreme Court of Connecticut, at the October Term, 1875, held:—

That a court, having regular terms, has no power to adjourn to a time after the commencement of another regular term of the same court, in the same county, and that it makes no difference that the adjournment is for the sole purpose of completing the trial of a single case, already commenced, all the other cases being continued. In the same case, it was *held*, that where a judge, by agreement of parties, continues the hearing of a case after the close of the term, and renders judgment as of the term, *nunc pro tunc*, the *agreement* is the sole ground of the jurisdiction.

Such is the law of Connecticut. The decision shows that, so far as any argument can be derived from the local law, the orders in question are null for want of jurisdiction. The Opinion just cited is in conformity with the sense of Congress, as expressed in the Act of March 2d, 1855, which provides: "That the trial of a cause in progress, at one term, shall not be stayed by the arrival of the day fixed by law for another term to commence, but that the Court may, notwithstanding, proceed and conclude the trial in the same manner and with the same effect as though another stated term of the Court had not intervened."

The Opinion of this Court, in Müller vs. Ehlers, goes further still, deciding, as it does, that, after the close of the term, at which judgment was rendered, the judges had no jurisdiction even to allow a Bill of Excep-

tions. It might be contended, with some plausibility, that where exceptions had been taken and noted at the trial, the allowance of the Bill was a ministerial act, the act of the judges, and not of the Court, and could, therefore, be performed in vacation, after the close of the term. But the Court say :—

"Upon the adjournment for the term, the parties were out of Court, and litigation there was at an end. The plaintiff was discharged from further attendance, and all proceedings thereafter, in his absence and without his consent, were *coram non judice.*"

The Order of the Court, therefore, made at the next term, directing that a Bill of Exceptions be filed as of the preceeding term, *nunc pro tunc*, was a nullity.

A fortiori, I contend, that the Order, in this cause, directing a special verdict to be made and entered upon the Record, as of the preceding term, when the judgment was rendered, *nunc pro tunc*, was null and void. The plaintiffs below gave no *consent*, and were not *present*, in contemplation of law, appearing, as they did, for the sole purpose of protesting against the jurisdiction.

Of the many other decisions of the Federal Courts, to the same effect, may I be excused for citing, Albers vs. Whitney, 1 Story, 310; Brush vs. Robins; 3 McLean; 487, Carman vs. Roberts, 3 Wheat. 591; Bank of the United States vs. Mass, 6 How. 31.

I am not unmindful that Courts always have jurisdiction over their Records, no matter after what lapse of time, to make them conform to what was actually done during the term, in the exercise of lawful jurisdiction. But I deny that they have any jurisdiction whatever, at subsequent terms, after judgment and discontinuance, to insert in the record that which was not done. In this case, there is no pretence that any special finding of facts was made by the Court, at the term in which the judgment was rendered, or that there was any intention, on the part of the Court, to make such finding. The Court did precisely what it intended to do, and what it intended to do, and did, the clerk entered upon the record. The jurisdiction over the cause, and over the parties, had ceased, and the case is not within the principle, that the Court always has jurisdiction over the record to make it conform to facts.

The fallacy in the argument, in behalf of the plaintiffs in error, consists in disregarding the distinction between jurisdiction *over the cause*, and jurisdiction *over the Record*. Yet, it must be conceded, that the apparent endeavor to impart to the proceedings the semblance of sup-

plying defects, or correcting errors, in the Record,* seems to betray a consciousness of the distinction.

The reasons given by the learned court, for the order made at the September term, 1874, page 27, are unavailing to show or confer any jurisdiction to make that order. If the opinion of the court was a special finding, a special verdict,, within the meaning of the Act of Congress, let the case rest upon that. Let it be reviewed upon that. No such order was necessary. The desire of the defendants below to have the findings of fact and the conclusions of law stated separately, and to tender exceptions to the conclusions of law, and their failure to do so, through misapprehension, are immaterial, and do not bring the parties, or the cause, back into court, and revive the jurisdiction. Who is responsible for the failure and the misapprehension, and how is the desire of the defendants ascertained to have existed, if it was not communicated to the court, during the term, while it had jurisdiction over the cause? No duty required the court to give effect to this desire, even if it was communicated. Under the act of congress, and under the rulings of this court, the defendants had no *legal right* to a *special* finding. Whether the finding should be general or special was a matter of pure discretion with the court. The refusal of the court to make it special, even if requested to do so, could not be assigned for error.†

The court cannot fail to observe the singular incongruity imparted to this Record, by inserting in it a special verdict, in addition to the general verdict, which there remains undisturbed. The matters set up in the notice, subjoined to the plea of *non assumpsit*, are part of that plea, and were put in issue under it. The general verdict, *did assume*, determined the fact of the promise, the loss, and the liability of the defendants to make good the loss, unless excepted. It also determined that it was not excepted, either because the matters, set forth in the notice, *were not true in point of fact*, or *were not legally sufficient*. It may be that it determined both. Who can say that it did not? Can the court, when, "the Record is no longer in the breast of the court, but is in the Roll," *legally* separate conclusions of law from conclusions of fact, and place upon the Record a finding, that the special matters set up in the notice were true in point of fact?

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*Page 23. "Ordered, that a finding of facts with the conclusions of the court thereupon, conformably to the opinion of the court heretofore filed, be prepared, &c. Page 27. The court having filed, announced and declared, their finding of facts, &c., embodied in the opinion of the court in writing, &c,

†Dirst vs, Morris, 14 Wall. 484; Ins. Co. vs. Folsom, 18 Wall, 237.

I submit that the transcript of the proceedings of the Circuit Court, after the April term, 1874, sent up here, are no part of the Record, and that, upon the Record, there is no error apparent.

The Policy of Insurance, in this case, was executed in September, 1864, the loss occurred in October of the same year, the action was commenced in 1865, tried in 1873, decided in 1874. The plaintiffs in error, after the rendition of the judgment, on the 28th of April, 1874, took no writ of error until the 7th day of October of the same year. But meanwhile, they obtained five different stays of execution, one, from the Circuit Judge, one, from the District Judge, acting as Circuit Judge, one, from the Circuit Court, at the September term, 1874, one, from a justice of this court, and finally one from the District Judge, acting as Circuit Judge, who allowed the writ of error.

In taking leave of the cause, after the lapse of so many years, may I express the hope that the decision of this court of final resort, on affirming the judgment of the Circuit Court, will award to these defendants in error just damages for the detention of the moneys due them on the 1st day of July, 1865, ascertained to be due by the judgment of the Circuit Court, on the 28th day of April, 1874, and so wrongfully withheld from them, together with their lawful costs.

The decision of this court, upon the question of jurisdiction, concerns vastly more the great interests of the public in the orderly administration of the law, under the authority conferred upon the courts, than it does any private interests of the parties. If the jurisdiction contended for shall be sanctioned by this court, causes in the Federal courts will have no end. No matter how many terms or how many years may elapse after judgment and discontinuance, the parties may be re-called,—to submit to whatever the court, in its wisdom, shall see fit to order.

Francis Fillmore

Counsel for Defts

in Error

WILLIAM C. BOONE ET AL.
vs.
THE ÆTNA INSURANCE COMPANY.

United States Circuit Court,
District of Connecticut.

Francis Fellowes for the plaintiffs.

George W. Parsons for the defendant.

OPINION.

WOODRUFF, *Circuit Judge*:—

The facts in this case are not doubtful nor in dispute. The action is brought to recover from the defendants the amount of an insurance against loss by fire, upon the goods of the plaintiffs, in their store, in Glasgow, Missouri, in the sum of six thousand dollars. It is founded on a policy executed by the defendant, dated September 2d, 1864, and the goods were destroyed by fire on the 15th day of October, 1864, within the term of the insurance. The loss was sufficiently great to entitle the plaintiffs to recover, if the defendant is liable at all, the whole sum insured. The plaintiffs have complied with all the terms and conditions of the policy, by the payment of premium, furnishing proper preliminary proofs of loss, and compliance with all other requirements. The policy, however, contained the following express proviso, annexed to the agreement of insurance, and in the body of the policy, namely:

"Provided always, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire."

The defence herein rests solely on this proviso, and the facts which are claimed to bring the plaintiffs' loss within its operation, so as to exempt the defendant from liability under the policy.

At and before the time of the fire in question, the city of Glasgow, within which the said store of the plaintiffs was situated, was occupied as a military post by the military forces and a portion of the Army of the United States, engaged in the civil war then, and for more than three

years theretofore, prevailing between the Government and the citizens of several Southern States, who were in rebellion and seeking to establish an independent government, under the name of the Confederate States of America.

As such military post, the said city of Glasgow was made the place of deposit of military stores, for the use of the Army of the United States, which stores were in a building, called the City Hall, of the said city of Glasgow, situated on the same street, on the same side of the street, and about one hundred and fifty feet distant from the plaintiffs' store, three buildings being located in the intervening space, not, however, in actual contact with either. Colonel Chester Harding, an officer of the United States, held the possession of the said city and had lawful charge and control of the military stores aforesaid.

On the said fifteenth day of October, 1864, an armed force of rebels, under military organization, surrounded and attacked the city, at an early hour in the morning, and threw shot and shell into the town, penetrating some buildings and killing soldiers and citizens. The city was defended by Colonel Harding and the military forces under his command, and battle between the loyal troops and the rebel forces continued many hours. The citizens fled to places of security, and no civil government prevailed in the city. The rebel forces were superior in numbers, and, after a battle of several hours, drove the forces of the Government from their position, compelled their surrender, and entered and occupied the said city.

During the battle, and when the Government troops had been driven from their exterior lines of defence, it became apparent to Colonel Harding that the city could not be successfully defended, and he, thereupon, in order to prevent the said military stores from falling into the possession of the rebels, ordered Major Moore, one of the officers under his command, to destroy them. In obedience to that order to destroy the said stores, and having no other means of doing so, Major Moore set fire to the City Hall, and thereby the said building, with its contents, was consumed. Without other interference, agency, or instrumentality, the fire spread along the line of the street aforesaid to the building next adjacent to the City Hall, and from building to building, through two other intermediate buildings, to the store of the plaintiffs, and destroyed the same, together with its contents, including the goods insured by the defendant's policy aforesaid.

During this time, and until after the fire had consumed such goods, the battle continued, and no surrender had taken place, nor had the forces of the rebels, or any part thereof, obtained the possession of or entered the city.

Upon these facts, and in view of the before-mentioned proviso in the policy of insurance, the question arises:—Is the defendant liable for the loss of the plaintiffs' goods, or does that proviso exempt the defendant from liability?

That question depends upon the answer to be given to some other questions, that is to say:—

1. It is insisted that, within the just and proper meaning of the proviso, the fire in question happened by means of the unlawful and rebellious attack upon the city by forces acting in assumption of usurped power, en-

deavoring to capture the forces of the United States, obtain posession of territory in the lawful posession and power of the United States, in aid of the usurped rebel government, and to forcibly accomplish its objects and designs; that the fire, and therefore the destruction of the goods was a military necessity, created by such attack by an illegal force; and so they happened by means of the rebellion and the employment of organized forces to effect the objects thereof, and the actual attempt of such forces to overcome the authority and Government of the United States; that this was therefore the direct or proximate cause of the loss, or, in the words of the proviso in the policy, "the means," by which the fire destroying the goods happened.

We think that this reasoning cannot prevail. Fire destroyed the goods. The fire was not communicated to the goods, nor to the building from which it spread, by the rebel forces nor by any person acting in co-operation with them, nor was it so communicated, in anywise in furtherance of the rebellion, its purposes or objects. No act of the rebels, in any physical sense, caused the fire. There is nothing to justify the inference that the rebels would have destroyed the Government stores found in the City Hall, by fire or otherwise, nor to justify the inference that the destruction of the goods, or any loss thereof, would have happened to the plaintiffs, by the capture and occupation of the city by the rebels. As matter of fact, there was no connection, direct, or by necessary inference, between such destruction of the goods and the attack of the rebels, the capture of the United States forces, and the occupation of the city.

But it is said that such attack by a superior armed force created a military necessity that the Government stores should be destroyed, which destruction, in the manner in which it alone could be done, involved the destruction of the plaintiffs' goods, and so that destruction was the necessary result of the attack; that the fire being thus the necessary result of the attack, it "happened by means" thereof.

The fire was actually and voluntarily communicated to the City Hall by the military authority of the United States.

It is conceded on this trial, that in the exigency, it was a lawful exercise of such military authority. The power was discretionary, and if the circumstances were such as made it discreet—and no doubt they were—such setting fire to the City Hall may have been a duty. In saying that it was voluntary, we only mean it was not a physical necessity, nor the physical result of any agency or act of the rebels, or of their unlawful or usurped power. It was physically independent of them, hostile to them, and an act which they not only did not commit, but would not have committed, and would, if possible, have prevented.

What is called a military necessity was, therefore, nothing more than this: It constituted the motive, and no doubt the sufficient motive, to the burning of the City Hall. This was not even an act of resistance to the attack upon the city, it was no part of the defence, nor a force employed in anywise in maintenance of the authority or possession of the Government. It was done in an exercise of military discretion, for the incidental purpose of preventing an accession to the means of the rebels for maintaining their rebellion.

The importance of preventing such an accession to their means furnished a motive, and it may be conceded a controlling motive, to the burning of the City Hall, but that did not make the fire happen by means of anything done by them. In a certain sense, it may be true that the City Hall was set on fire by reason of the attack upon the city by an armed force of rebels; but between that attack and the fire was interposed another actor, who caused the fire, who set in operation the means by which it happened. An efficient and a sufficient cause of fire, and the means by which it happened, intervened between the acts of the rebels and the fire itself, and a cause or means without which, (notwithstanding the acts of the rebels), the fire would not have happened at all.

In the language of Mr. Justice Miller, in the Supreme Court of the United States, in Insurance Company vs. Tweed, (7 Wallace, 52):

"If a new force or power has intervened, itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." That language was used in reference to a similar provision in a policy of insurance, and in aid of the enquiry by what "means" the fire happened. There, as in this case, there was, in some sense, another cause but for which the fire would not have happened at all; and the opinion shows that the existence of just such an influential cause is not enough to bring a case within the proviso. The facts here are much stronger than the reasoning there in withdrawal of the case from the operation of the proviso, because, although the fire would not have happened but for the existence of such remote cause, (the attack by the rebels,) it is equally true that such remote cause would not have produced the fire at all.

To apply the criterion suggested by Mr. Justice Miller, there was here the intervention of distinct, new, affirmative, power and force, other than the acts of the rebels, not only sufficient but efficient, as the cause of the fire in the City Hall, and the actual means by which it happened.

We think, therefore, that it cannot be held that, within the meaning of the proviso in question, the fire which destroyed the plaintiffs' goods happened by means of the rebellion, or of anything done by the rebel forces.

An obvious iuquiry is suggested by the facts stated, whether the setting on fire of the City Hall was the cause of the loss in such sense that, within the proviso, it was "the means" by which the fire happened, or whether that also was not the remote cause of the fire which destroyed the plaintiffs' goods.

In our preceding discussion we have assumed that the setting on fire of the City Hall was the means of the fire to the plaintiffs' goods, within the proviso, unless the rebellion or the acts of the rebels should be held to be such means; that, in this sense, the acts of the lawful military authorities of the United States were the proximate and efficient cause and means by which the fire happened and of the destruction of those goods by fire.

We do not find it necessary to discuss the question, what was the proximate and what was the remote cause of such destruction, under this head. The suggestion that the setting on fire of the City Hall was only the remote cause, while the casual and incidental communication of the fire to the

plaintiffs' store, from the burning building next adjacent thereto, was the proximate cause of the fire, and the means by which the fire happened, within the meaning of the said proviso, is not made by the counsel for either of the parties. The contrary is conceded, if not, in truth, insisted upon, by both. The decision by the Supreme Court in the Insurance Company vs. Tweed was assumed by both to be decisive against such a suggestion. We are therefore not called upon to pursue that subject.

It remains to consider the claim of the defendant, that the fire happened by means which exempt the company from liability, upon the ground that it was caused by "military power," and was therefore within the very words of the proviso. It is insisted by the plaintiffs that the word "military," in the connection in which it is found in the proviso, does not mean the lawful military power of the Government, acting lawfully in the performance of the proper duty of the Government forces, whether engaged in hostile contest with an invading army, or in a forcible endeavor to suppress an internal rebellion.

For reasons which seem to us convincing, we are of opinion that the word "military," in the proviso in question, has no reference to the lawful acts of the military forces of the Government. Neither the reasons for the insertion of the proviso in policies of insurance against fire, nor the history of that insertion, nor any judicial discussions upon the meaning and purport of the proviso, nor the discussions had upon its construction with especial reference to the meaning of other terms employed therein, sustain the interpretation for which the defendant contends, It is true that the precise question, what is the import and legal effect of the word "military," does not appear to have been decided in any case to which our attention is called; and had that proviso been now for the first time employed to exempt the defendant from a portion of the liability which a preceding general agreement for insurance imports, there would be much plausibility in the argument that the defendant intended not only to exclude liability for the consequences of an insurrection, invasion, or rebellion, but for the possible consequences of those violent and forcible means which may be necessary to repel or suppress it. And yet, if this was the intent, it may be pertinently asked why was the exemption limited to the employment of military force, and not made to include the forcible and violent measures which municipal authorities or police organizations might find it necessary to employ to suppress a riot, insurrection, or other civil commotion?

The proviso containing the words "military or usurped power" was inserted in policies as early as 1720; and the history of the subject, as given in Ellis on Insurance, &c. (p. 41. &c.,) Park on Insurance, (657,) Marshal on Insurance, (791, &c.,) shows that the occasion thereof was manifestly the liability to loss by fire caused by a foreign enemy and invasion. And the terms "military or usurped power" were used in reference to the existence of claims to the exercise of governmental authority, enforced within the kingdom, and constituting rebellion against the recognized government. The clause originally embraced no other terms than were apt to indicate the violence of enemies from abroad, and of usurpation exercising gov-

ernmental authority, or rebellion sustained by organized forces within the kingdom.

The exception, as then introduced into policies, read as follows: "No loss or damage by fire happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company."

The idea of interference with the peace and safety of the realm by organized force from abroad, or rebellion arising to the proportions of actual or at least formal usurpation of governmental authority, (whether more or less successful) and manifestly hostile to the lawful government, is indicated by this language. The experience of the country in those days of not infrequent invasion and rebellion, the result of disputes touching the right of succession to the crown of England, gave occasion for the exception, and, by suggesting its cause, furnished also an explanation of its meaning. Foreign invading armies, and the organized forces, raised in whole or in part within the kingdom, to overturn the government, or to enforce the alleged title of a claimant to the crown, usurping and endeavoring forcibly to usurp governmental authority, were in view. Reason for refusing to become liable for losses caused by these forces, in either form, is found not only in helplessness and inability to resist them, and the magnitude of the destruction they may effect, but in the want of recourse for indemnity to those who commit the violence. It is well and pertinently suggested that while, on the one hand, no one would think of obtaining insurance against the lawful acts of the government, so on the other, an insurer would not think of excepting such lawful acts as a cause of the fire against which he insured. The citizen without insurance, and an insurer making insurance, if that contingency was contemplated, would regard his government as bound and presumptively always ready to indemnify against losses sustained by acts done in its own defence, or in maintaining the authority of the laws.

The subsequent extension of the proviso to "riot, insurrection, and civil commotion," rather confirms than impairs this view of the meaning and intent of the original proviso, and these were held to import occasional local or temporary outbreaks of lawless violence; and such as, though temporarily destructive in their effect, did not rise to the proportions of organized rebellion against the government.

The observations made by the court in the few early cases in which this proviso came under consideration, (although any possible separate meaning of the word "military" is not suggested), indicate that the clause has reference to acts done in disregard or in subversion of lawful authority, and includes only such affirmative acts. (Drinkwater vs. London Assurance Company, 2 Wilson, 363, Langdale vs. Mason, referred to by the text above cited. In the last-named case Lord Mansfield used this significant language: "What is meant by military or usurped power? They are ambiguous, and they seem to have been the subject of a question and determination. They must mean rebellion where the fire is made by authority; as, in the year 1745, the rebels came to Derby, and if they had ordered any part of the town or a single house to be set on fire, that would have been by authority of a rebellion. That is the only distinction

in the case. It must be rebellion got to such a head as to be under authority."

The term military is employed in the proviso in a meaning synonymous with the usurped power intended to be described, or as qualifying and explaining what was meant by usurped power. It was in this view, and as a ground of distinguishing between the usurped power specified in the proviso and the power of a mob, that Mr. Justice Bathurst, in the case of Drinkwater, construed usurped power to mean either an invasion by foreign enemies, to give laws and usurp the government thereof, or an internal force or rebellion, assuming the power of the government, by making law and punishing for not obeying those laws. "An invasion" necessarily supposed organization and military power or force; so of the words "foreign enemy;" and in the use of a phrase which would include also violence within the kingdom, viz, "military or usurped power," something in like manner hostile to or subversive of the laws and of lawful government was intended as plainly as if the clause had been, "or any other military or usurped power."

That the terms used in the proviso have express application to force illegally employed and adverse to the government is indirectly but impliedly involved in the decision and opinion of the court in the City Fire Insurance Company vs. Corlies, (21 Wendell, 307.) The court declared the meaning of the words usurped power long settled.

The property there in question was destroyed by order of the mayor of the City of New York, for the purpose of arresting a conflagration. It was claimed that this was a usurpation of power and authority in disregard of the law. The court decided that, if the mayor had no authority to do the act, the company were still liable, for that it was not usurpation of the power of government, "against which the defendants intended to protect themselves." The case of Sprull vs. North Carolina Ins. Co. (1 Jones N. Car. Law R., 126,) tends strongly in the same direction; and, if an armed patrol may be deemed a military power, that case is especially pointed and significant.

These considerations, and the significant fact that every other word used in this proviso to designate the means by which a fire may happen for which the company will not be liable, express clearly and unequivocally what is unlawful, employed in disregard or in subversion of the laws or the government, furnish a strong case for the application of the maxim relied upon by the plaintiffs, *noscitur a sociis*. This maxim is not conclusive; but in a case of doubt, and where like meaning will satisfy the provision, where there is no other clause or language hostile to the like interpretation, especially where other considerations tend to support it, the maxim has special force and significance.

We think it not too much to say that most, if not all, intelligent readers of the proviso in question, would at once declare that the word military therein was employed in a sense kindred to the other terms, and that it described an organization military in its form, but unlawful and hostile to the government in its character and purpose.

Again, it is a familiar rule in the construction of provisos and exceptions of the sort made, in qualification of the general positive agreement, that

words susceptible of either construction should be taken most strongly against the speaker, or party whose language is to be interpreted, and that the general positive agreement should have effect, unless the exception clearly withdraws the case from its operation. This has especial force when the other considerations pertaining to the subject tend to the same result.

To this it should be added, that it is the duty of an insurance company, seeking to limit the operation of its contract of insurance by special provisos or exceptions, to make such limitations in clear terms, and not leave the insured in a condition to be misled. The uncertainties arising from provisos, exceptions, qualifications and special conditions, in or endorsed upon policies, have been often condemned, and such special modifications are justly characterized as traps to deceive and catch the unwary.

An insured may reasonably be held entitled to rely on a construction favorable to himself, where the terms will rationally permit it; and where, as in this case, such construction gives a signification to a word *ejusdem generis* of all those with which it is associated, in harmony with the general character and purpose of the provision in which they are found, he is clearly entitled to insist upon such construction.

Our construction is, that the plaintiffs are entitled to judgment for the amount of the insurance, with interest thereon from the expiration of sixty days from the second day of May, 1865, on which day it is admitted the preliminary proofs of loss were furnished to the defendant, that is to say, with interest from the first day of July, 1865, and with costs.

Jepson Bros., Printers. Hartford, Conn.

United States Supreme Court.

THE ÆTNA INSURANCE CO.,
vs.
WILLIAM C. BOON, ET AL.
} In Error.

No. 263.

OCTOBER TERM, 1876.

BRIEF FOR THE DEFENDANTS.

CASE.

This is a writ of error, brought to review a judgment of the Circuit Court of the United States for the District of Connecticut, in an action of *Assumpsit*, upon a Policy of Fire Insurance, tried by the Court, under the Act of March 3d, 1865, upon the general issue, with a special notice, filed with the plea, setting up that the policy contained a Proviso, excepting losses happening by means of invasion, insurrection, riot, civil commotion, or any military or usurped power, and that the loss, in this case, happened by such means.

The Court found the issue generally for the plaintiffs,

and, thereupon, rendered judgment for them to recover the amount of the loss.

No exceptions were taken at the trial, and no special finding of facts was requested, or made, and the cause was discontinued. At the next term of the Court, pursuant to certain proceedings before the judges, in vacation, a Bill of Exceptions was presented, allowed, and signed, and a Special Finding of Facts was made, both of which were ordered to be made a part of the record, and to be filed, *nunc pro tunc*, as of the preceding term.

The plaintiffs in error seek to review the cause before this Court, upon the Bill of Exceptions and the Special Finding of Facts, above referred to. The Bill of Exceptions contains no point which does not arise upon the Special Finding. The material facts found are:—

That the property of the plaintiffs, insured by the policy, was situated in the town of Glasgow, Missouri, that that town was occupied by a military force of the United States, under the command of Col. Harding, who kept his military stores in a building, called the City Hall, that the property of the plaintiffs, above named, was in a store belonging to them, on the same street, on the same side of the street, about one hundred and fifty feet distant, with three buildings intervening:

That, on the 15th day of October, 1864, when the loss took place, the town of Glasgow was attacked by a military force of the Confederate Army, and that after the battle had continued for some hours, Col. Harding, believing he would be obliged to surrender the town,—in order to prevent his military stores, in the City Hall, from falling into the hands of the rebels, set fire to the City Hall, which was consumed, with its contents, that the fire spread, without any intervening cause, from building to building, along the line of the street, until it reached the plaintiffs' store, and consumed that, with the goods insured in this policy.

The plaintiffs in error, assuming the *burden* of bringing the loss within the exceptions, according to well established principles, Cook *vs.* Lounsbury, 8 C. R., 458, Hunt *vs.* Hudson River Fire Ins. Co., 2 Duer, 481, Clark *vs.* Hamilton, 9 Gray, 148, contend, that, upon these facts, the judgment cannot be sustained, because, they say:—

First, That the act of Col. Harding, which was the immediate cause of the loss, was the act of a military power, within the meaning of the Proviso:

Second, If this be not so, that the rebels, or the rebellion, were, undeniably, a military or usurped power, and created a *military necessity* for the act of Col. Harding, through the medium of which necessity, they came into such *proximity* with the loss that they were the cause of it, and so it happened by means of a military or usurped power.

POINTS.

I.

The loss must be attributed to its *proximate* cause.

In jure causa proxima, non remota, spectatur.

Gen. Mutual Ins. Co., vs. Sherwood, 14 How., 352.
Ins. Co. vs. Tweed, 7 Wall., 44.
Welts vs. Conn. Mutual Life Ins. Co., 48 N. Y. Rep.

II.

The proximate cause is the cause next preceding the effect, in operation at the time, and capable of producing the effect. In this case, this cause was the act of Col. Harding in setting fire to the City Hall.

1. This act was a cause sufficient, in itself, to produce the loss, and, in fact, did produce it. No other cause "intervened between this act and the fact accomplished."

2. Invaders, persons in insurrection, riot, or civil commotion, did not set the fire. The rebels had no part in the destruction of the goods. This destruction was an act adverse to them. But for the act of Col. Harding, the plaintiffs' goods would not have been destroyed. The rebels took the town, but destroyed nothing.

3. As to the so-called military necessity, it is not named in the contract as a cause of exception.

Besides, it had, in itself, no *causal* power. It may have furnished a *motive* for the act of Col. Harding, and have

been, in this sense, an *antecedent* to that act, but it had nothing to do with *causation*.

4. The rebellion and the attack on Glasgow may have been an *antecedent*, without which the loss would not have happened, but were not the *cause* of it.

III.

The act of Col. Harding was not the act of a military or usurped power.

1. It will not be contended that it was an act of *usurped* power.

IV.

I maintain that it was not the act of a *military* power.

FIRST.

From the proper construction of the language of the proviso.

1. Power, in itself, means, simply, *power*, not lawful authority.

Military power is not lawful military authority, but rests upon *mere force of arms*, and must, therefore, of *necessity*, be *usurped*.

2. The word, *or*, is here used as *conjunctive*, not as *disjunctive*. It means both military *and* usurped. In other words, it is used to express *equivalents*. Thus, the draftsman of the exceptions means to say: Any loss happening

by means of any military power, *or*, which is the same thing, of any usurped power, shall be excepted.

3. *Or* is often so used:

Thus we say, a thing is a square, *or*, a figure under four equal sides and angles. And in this policy, the draftsman says:

Loss *or* damage;
Goods *or* merchandise;
Happen *or* take place;
Military *or* usurped.

4. This construction is sustained by the implied *antithesis.*

Military has its antithesis in *Civil; Military* power, in *Civil* power.

SECOND.

From the history of the first introduction of the words into policies.

1. The words, "military or usurped power," were first introduced into Policies of Insurance, in Great Britain, soon after the Jacobite Rebellion of 1715, and had exclusive reference to the military or usurped power of the Pretender, and no reference to any lawful military authority or power of the realm.

Ellis on Insurance, 41.
Park on Insurance, 657.
Marshall on Insurance, 791.

2. Originally, the exceptions were, "fire occasioned by invasion and foreign enemy." Subsequently, the words "or

any military or usurped power, *whatsoever*," were added. The framers of the exceptions seem to have considered, invasion, as a military power, foreign enemy, as a military power, and then lest these terms might not be comprehensive enough to embrace domestic rebels, like the Pretenders, and their followers, added, *any* military or usurped power *whatsoever*. Manifestly, the words, military and usurped, were identical in meaning.

Bell's Commentaries on the Laws of Scotland,
vol. I., p. 672.

THIRD.

From the Judicial Construction of the meaning of the words, by the Courts.

The courts of Great Britain, and of this country, without making any distinction between the words military and usurped, but treating them both as signifying the same thing, have uniformly held them to mean rebellion conducted by authority. In the words of the opinion below, "They seem not to have contemplated the possibility of their having any separate meaning.

Drinkwater vs. The London Assurance Co.,
2 Wilson, 363, decided in 1767;
Langdale vs. Mason, 2 Marshall on Insurance, 791,
decided in 1780;
City Fire Ins. Co. vs. Corlies, 21 Wend., 367, in 1839;
Sprull vs. the North Carolina Mut. Life Ins. Co.,
1 Jones N. C. Law Rep., 126, in 1853;
Harris vs. York Ins. Co., 50 Penn. Rep., 341, in 1865.

V.

The parties to the contract are bound by the Judicial construction of the meaning of the words, and must be considered as having used them in the sense established by the Courts.

City Fire Ins. Co., vs. Corlies, 21 Wend., 367.

VI.

The maxim, *Noscitur a Sociis*, in this case, furnishes the true rule of interpretation.

1. Every other cause of exception, named in the proviso, "Invasion, insurrection, riot, civil commotion," being unlawful, the words "military power," in the same category, signify an *unlawful* military power, not the lawful military authority of the country.

2. This observation derives especial force from the fact, that the word, "military," stands here in such close fellowship with the word, "usurped." Military, *or* usurped, is the expression.

Breasted vs. The Farmers' Loan and Trust Co.,
4 Seld., 304;
Harper's Adm'rs vs. Phœnix Ins. Co., 19 Mo., 506;
Cluff vs. Mut. Benefit Life Ins. Co., 13 Allen, 308.

VII.

The act of Col. Harding, so far from being the act of a military or usurped power, was an act of Civil jurisdiction, whereby, he asserted, in behalf of the nation, their paramount title to the property, by virtue of the Right of *Eminent Domain*.

Mitchell vs. Harmony, 13 How., 113.
Grant vs. The United States, Court of Claims Rep., vol. I., p. 41.
Wiggins Case, *Idem*, vol. III., p. 412.
Harris vs. York Ins. Co., 50 Penn. Rep., 341.

1. The insurers had no need to except such a loss, since the nation are bound to make it good.

2. This however does not exempt them from liability. But, on paying the loss, they are substituted to the rights of the insured.

VIII.

If the destruction of the goods was not the *direct* consequence of the act of Col. Harding, and, therefore, not a *taking* of private property for public use, because not *intended* by him, but *accidental*, it was just one of those accidents, the peril of which the insurers assumed.

It was not thereby converted into the act of rebels, nor did it, therefore, happen by means of invasion, insurrection, riot, civil commotion, or of any military or usurped power.

IX.

The Underwriters made their own exceptions, and the *Onus* of proving the loss to be within the exceptions is on them. If, therefore, there is any ambiguity in the words employed, or any doubt as to the loss being within the exceptions, the principle of *fortius contra proferentem* furnishes the rule.

X.

In conclusion, the obvious natural import of the words employed, designates plainly the unlawful character of the causes excepted; the history of their first introduction into policies of insurance shows the nature of the risks intended to be excluded; and the subsequent adjudications of the meaning of the words render it certain, that the words "military or usurped power," have no reference to acts of constitutional sovereignty, but are limited to acts of rebellion. The act of Col. Harding, which caused the loss, was not an act of rebellion.

The loss was not therefore excepted by the Proviso.

XI.

Thus far, it has been assumed that the Bill of Exceptions and the Special Finding of Facts, sent up here, are a part of the Record.

If the Bill of Exceptions be a part of the Record, it is fatally defective:—

First, Because it does not show, *upon its face*, that the

exceptions were taken at the trial, and during the progress of the cause, as required by the principles of the common law, the Act of Congress, and by many decisions of this Court.

It merely shows that the exceptions were taken within the time allowed by the Court, in its orders on file. Record, P. 26.

These orders are three in number, all made long after the close of the term when the judgment was rendered, viz.:—

1. Order to show cause why the defendants should not have leave to make a Bill of Exceptions, to be filed *nunc pro tunc*, as of the term,—made in vacation, July 13th, 1874. Record, P. 22.

2. Order of Judge Shipman, made, upon the hearing of the order to show cause, granting leave to prepare the exceptions, August 22d, 1874. Record, P. 23.

3. Order of the Court, at the next term, adopting the order of Judge Shipman,—allowing the Bill of Exceptions, and ordering it to be entered, *nunc pro tunc*, as of the preceding term. Record, P. 28.

It appears *affirmatively*, from these orders, that the exceptions were not taken at the trial. But after trial, judgment, discontinuance, and close of the term, in vacation, leave is asked, not to have exceptions which were made at the trial, *allowed*, but to *make* such exceptions as the defendant *may desire* to make, Record, P. 22, and this leave is granted, and the exceptions, which the defendant then desired to make, are allowed, and ordered to be entered of record, as of the April term, *nunc pro tunc*.

These exceptions cannot be heard here.

Sheppard vs. Wilson, 6 How., 275.
Turner vs. Yeates, 16 How., 14.
Walton vs. United States, 9 Wheat., 657.
Muller vs. Ehlers, 1 Otto, 249.
Phillip's Practice, 122–3–7.

SECOND, Because the exceptions are not taken to any specific point of law, ruled upon by the Court. They are exceptions to the Court's finding, generally, for the plaintiffs, an issue consisting of both law and fact. Record, P. 26. Observe the language :—

Whereupon, &c., the defendant's counsel insisted that the matters introduced in evidence, on the part of the defendant, and the facts found by the Court, were sufficient to entitle the defendant to judgment, and to bar the plaintiffs of their action, and the judges, *at the April term*, delivered their opinion, that the matters so introduced in evidence were not sufficient to bar the plaintiffs of their action. Whereupon the defendant excepts.

This is in effect :—

I, the defendant's counsel, demurred to the finding of the Court, and upon the whole case, contended that the Court ought to find for the defendant. But they found for the plaintiffs. Therefore I except.

The observations of Mr. Justice Miller, in Norris vs. Jackson, 9 Wall., 125, are in point.

"In the case of a general verdict, which includes, or may include, as it generally does, mixed questions of law and fact, it concludes both, except so far as it may be saved by some exception, taken to the ruling of the Court in point of law."

City of Richmond vs. Smith, 15 Wall., 429.
Insurance Co. vs. Folsom, 18 Wall., 237.
Insurance Co. vs. Sea, 21 Wall., 158.

XII

As to the Special Finding of Facts,—if the Court still had jurisdiction over the cause after the close of the term,—having made a general finding, they had exhausted their power, and could not also make a special finding.

The Act of Congress, whence the jurisdiction is derived, confers a power in the alternative, a power to render a general verdict, *or*, a special verdict, at the *discretion* of the Court, Dirst vs. Morris, 14 Wall, 484, Ins. Co. vs Folsom, 18 Wall, 237, but not to render *both*, at the same time. Having *exercised the discretion*, and rendered a *general verdict*, it can not; afterwards, even at the same term, insert, in the record, a *special verdict*, in addition to the general verdict.

XIII.

The opinion of the Court, filed in the cause, is not a special verdict, and can not be reviewed.

Generes vs. Bonnemar, 7 Wall., 565.
Flanders vs. Tweed, 8 Wall., 428.
Dickinson vs. The Planters' Bank, 16 Wall., 250.

XIV.

But it is a conclusive objection to the history of the Proceedings after the term at which the judgment was rendered, as constituting any part of the record, that the Court had no jurisdiction to do any act recited in that history. This necessarily results from the mere fact of *Terms*, with continuances, and discontinuances:—

1. It was not an exercise of jurisdiction *over the record*,

to supply *clerical* defects, or to correct *clerical* errors, but of jurisdiction, *over the parties* and *over the cause*, in matters "which entered into the consideration of the Court," while in the exercise of lawful jurisdiction.

2. The desire of the defendants, and their failure to communicate that desire to the Court, Record, page 27, confer no jurisdiction on the Court. The subject of the desire was not the supplying of *clerical* defects, or the correction of *clerical* errors, but was the exercise of a *discretionary* jurisdiction over the cause, which could be exercised only at the term, and before judgment, and which had been exercised, by rendering a general verdict, instead of a special verdict, which, it is *now said*, the defendant desired.

3. That the conclusions of fact were embodied in the opinion of the Court, is immaterial. That does not make them a special verdict. The opinion is no part of the Record. So far as it concerns *jurisdiction*, they might as well have been embodied, in the memory of the Court, as in the written memorandum.

3 Blackstone's Com., 275, 316.
Petersdorff's Abridgement, Tit. Amend., 504.
Albers vs. Whitney, 1 Story, 310.
Brush vs. Robins, 3 McLean, 487.
Carman vs. Roberts, 3 Wheat., 591.
Bank of the United States vs. Mass., 6 How., 31.
Muller vs. Ehlers, 1 Otto, 249.

XV.

This Record, therefore, presents no question which can be reviewed.

And if the plaintiffs in error are to be regarded as intending the inevitable consequences of their acts, the case falls within the meaning of the very pointed observations of the Court, in Amory vs. Amory, 1 Otto, 356.

"We can adjudge damages under Sec. 1010, Revised Statutes, and Rule 23 in all cases where it appears that a writ of error has been sued out merely for delay This gives us the only power we have to prevent frivolous appeals, and writs of error; and we deem it not improper to say, that this power will be exercised, without hesitation, in all cases where we find that our jurisdiction has been invoked merely to gain time."

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